BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ADRIENNE MARTINEZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 211,399
U.S.D. NO. 501	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent appealed the Award dated February 26, 1998, entered by then Assistant Director Brad E. Avery. The Appeals Board heard oral argument in Topeka, Kansas, on September 23, 1998.

APPEARANCES

George H. Pearson, of Topeka, Kansas, appeared for the claimant. Gregory J. Bien, of Topeka, Kansas, appeared for the respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Assistant Director averaged a 50 percent task loss and a 73 percent wage loss and found that claimant had a 61.5 percent permanent partial general disability as the result of a December 22, 1995 fall. Respondent requested the Appeals Board to review the following issues:

(1) Did the alleged accident arise out of and in the course of employment with the respondent?

(2) Did the fall either injure claimant or permanently aggravate, accelerate, or intensify a preexisting condition?

(3) What is the nature and extent of injury and disability?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

(1) Adrienne Martinez worked for U.S.D. No. 501 as a media secretary. On December 22, 1995, she slipped on some melting snow and ice as she arrived at work and while she walked down a hallway on the school district's premises.

(2) For several years before the accident, Ms. Martinez had symptoms that were consistent with fibromyalgia. But, for over two years before the December accident, those symptoms were quiescent. The Appeals Board affirms Assistant Director Avery's finding that the December 1995 fall either aggravated, accelerated, or intensified Ms. Martinez's preexisting condition.

(3) The Appeals Board also affirms the Assistant Director's conclusion that Ms. Martinez has lost the ability to perform 50 percent of her former work tasks. That conclusion is supported by the testimony of board certified orthopedic surgeon Glenn Martin Amundson, M.D., who is associated with the University of Kansas Medical Center and who was asked by the Division of Workers Compensation to evaluate Ms. Martinez and provide an unbiased opinion for purposes of this proceeding. Although Dr. Amundson did not speak in absolutes, he did indicate that Ms. Martinez should avoid, would poorly tolerate, or have significant difficulty performing four of eight of her former work tasks. That testimony is sufficient to establish that Ms. Martinez has lost the ability to perform those work tasks. In addition to providing an opinion as to which work tasks Ms. Martinez could no longer perform, the doctor also testified that Ms. Martinez had a 5 percent whole body functional impairment according to the AMA Guides to the Evaluation of Permanent Impairment.

(4) Since the December 1995 accident, Ms. Martinez has returned to work for the school district. But she is limited to working approximately 20 hours per week due to fatigue, which psychiatrist Gilbert R. Parks, M.D., testified was directly related to the fibromyalgia.

(5) The Assistant Director's finding that Ms. Martinez has a 73 percent difference in pre- and post-injury wages is also affirmed. Because of the fatigue that is directly related to the fibromyalgia, Ms. Martinez is unable, at this time, to work full time. Therefore, comparing her post-injury average weekly wage of $101.08 to her pre-injury average weekly wage of $374.36 yields a 73 percent difference.

(6) Ms. Martinez's sleep apnea is a condition separate and apart from the fibromyalgia and, therefore, that sleep disorder is not the school district's responsibility. That conclusion

is supported by the testimony of Ms. Martinez's expert witness, psychiatrist Gilbert R. Parks, M.D.

(7) The Appeals Board adopts the Assistant Director's findings and conclusions as set forth in the Award to the extent they are not inconsistent with the above.

CONCLUSIONS OF LAW

(1) When deciding whether an injury arises out of and in the course of employment, workers shall not be considered as being on the way to assume their job duties or having left such duties when they are on the employer's premises.[1] Ms. Martinez's accident occurred on the school district's premises and arose out of and in the course of her employment.

(2) Because hers is an "unscheduled" injury, the formula for permanent partial disability benefits is governed by K.S.A. 44-510e, which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute, however, must be read in light of Foulk[2] and Copeland.[3] In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that the employer offered that paid a comparable wage. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based

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[1] K.S.A. 1995 Supp. 44-508(f); Thompson v. Law Offices of Alan Joseph, 256 Kan. 36, 883 P.2d 768 (1994).

[2] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

[3] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

on ability rather than actual wages when the worker failed to put forth a good faith effort to find appropriate employment after recovering from the injury.

(3) Under these facts, neither Foulk nor Copeland are applicable as Ms. Martinez has neither wrongfully refused to work nor engaged in any conduct that is tantamount to a refusal to work. Further, she has not attempted to wrongfully manipulate her workers compensation award or engage in other conduct that could be construed as being in bad faith. At this time Ms. Martinez is working part-time for the school district, which is appropriate given her injury and condition. Therefore, the good faith requirement of Copeland is satisfied.

(4) Averaging the 50 percent task loss with the 73 percent wage difference creates a 61.5 percent permanent partial general disability as found by the Assistant Director.

AWARD

WHEREFORE, the Appeals Board affirms the Award dated February 26, 1998, entered by Assistant Director Brad E. Avery.

IT IS SO ORDERED.

Dated this ____ day of October 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson, Topeka, KS
Gregory J. Bien, Topeka, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director